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**FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY**

June 9, 1995

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William F. Caton
Acting Secretary
Federal Communications Commission
Mail Stop 1170
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Dear Mr. Caton:

Re: *CC Docket No. 93-179 - Price Cap Regulation of Local Exchange Carriers, Rate-of-Return Sharing and Lower Formula Adjustment*

On behalf of Pacific Bell, please find enclosed an original and six copies of its "Opposition" in the above proceeding.

Please stamp and return the provided copy to confirm your receipt. Please contact me should you have any questions or require additional information concerning this matter.

Sincerely,



Enclosure

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

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In the Matter of

Price Cap Regulation of
Local Exchange Carriers

Rate-of-Return Sharing
and Lower Formula Adjustment

CC Docket No. 93-179

OPPOSITION OF PACIFIC BELL

Pacific Bell ("Pacific") hereby respectfully opposes the Petition for Reconsideration filed by MCI Telecommunications Corporation ("MCI") of the Commission's April 14, 1995 order in the above-captioned proceeding.¹

MCI says that the "Commission's finding that it can apply its new rule requiring add-back only prospectively is ... inconsistent with findings the Commission made in its Add-Back Order." (MCI, p. 3.) But this contention, even if true, does not support reconsideration of the Add-Back Order. "Consistency" has nothing to do with it. Under the rule of *Bowen v. Georgetown University Hospital*, all retroactive rulemaking is forbidden to Federal agencies without express statutory authority to engage in it.² The Commission has no retroactive

¹ *Price Cap Regulation of Local Exchange Carriers; Rate of Return Sharing and Lower Formula Adjustment*, CC Docket No. 93-179, Report and Order, FCC 95-133, released April 14, 1995 (Add-Back Order).

² *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204 (1988). See also *Motion Picture Ass'n of America v. Oman*, 969 F.2d 1154 (D.C. Cir. 1992).

rulemaking authority. Any “findings” the Commission made in its Add-Back Order are beside the point. The Commission may not ignore limits on its authority merely because it finds them inconvenient or inconsistent with its (or MCI’s) view of the public interest. “It is, of course, axiomatic that the Commission cannot re-write the Communications Act -- only Congress can.”³ However wrong the Add-Back Order may have been in other respects, the Commission was right when it said that its add-back rule could, “as a legal matter, be applied only on a prospective basis.”⁴

The D.C. Circuit has strictly construed limits on the Commission’s rulemaking authority. In a 1992 case, the Commission defended an amendment to AT&T’s price cap rules by asserting that it was “clarification” and not rulemaking. The Commission lost that case.⁵ In 1993, the Court chided the Commission for having rejected the OPEB tariffs. “[W]hatever the intrinsic merits of” the Commission’s findings, the Court explained, “the Commission is free to consider them as a basis for *amending* its current rule, not for concocting a new rule in the guise of applying the old.”⁶

According to MCI, “the rule the Commission has adopted is not a new rule; it is merely a codification of long-standing, and prior to the advent of price cap regulation, unopposed Commission practice.” (MCI, p. 3.) But that, too, is fundamentally in error. “Practices” do not mature into rules with the force of law no matter how “long-standing” or

³ MCI Petition for Reconsideration, CC Docket No. 94-1, filed May 19, 1995, p. 14 (citing *MCI v. FCC*, 765 F.2d 1186 (D.C. Cir. 1985)).

⁴ Add-Back Order, para. 49, n.65 (citing *Bowen*).

⁵ *Amer. Tel. & Tel. Co. v. FCC*, 974 F.2d 1351 (D.C. Cir. 1992).

⁶ *Southwestern Bell Tel. Co. v. FCC*, 28 F.3d 165, 173 (D.C. Cir. 1994) (emphasis in original).

“unopposed” they may be.⁷ Otherwise, agencies could simply dispense with APA or due process requirements such as notice and an opportunity for public comment.

In fact, the Commission’s rules do not allude to add-back even indirectly. The price cap orders speak more than once of a sharing or lower formula adjustment as a “one time adjustment” to a single year’s rates.⁸ Add-back makes a single year’s sharing or LFAM into a perpetual, compounding adjustment. It materially changes the price cap rules.

The Add-Back Order is internally inconsistent, but not for the reasons that MCI states. Although the Commission conceded that its new rule could be applied only prospectively, in fact the Commission gave it retroactive effect. As a result of the Commission’s decision, sharing obligations that were incurred two years ago must now be treated as earnings for last year. The Commission lacks the rulemaking authority to alter the legal implications of sharing obligations incurred in the past. But that is what it has done. The

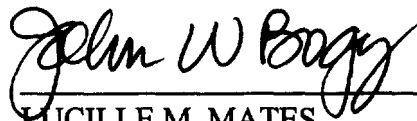
⁷ *United States Tel. Ass’n v. FCC*, 28 F.3d 1232-36 (D.C. Cir. 1994).

⁸ See *Policy and Rules Concerning Rates for Dominant Carriers*, 5 FCC Rcd 6786, 6803 (1990); *on recon.*, 6 FCC Rcd 2637, 2691, n.166 (1991).

Add-Back Order is an exercise in prohibited retroactive rulemaking. MCI's Petition for Reconsideration should be denied.

Respectfully submitted,

PACIFIC BELL

A handwritten signature in cursive script, reading "John W. Bogy", is written over a horizontal line.

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Its Attorneys

Date: June 9, 1995

CERTIFICATE OF SERVICE

I, Michelle K. Choo, hereby certify that on this 9th of June, 1995 a true and correct copy of the foregoing **Opposition of Pacific Bell** was mailed, first class-postage prepaid, to the parties shown on the attached list.

Chris Frentrop
MCI Telecommunications Corporation
Senior Regulatory Analyst
Federal Regulatory
1801 Pennsylvania Ave., NW
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Michelle K. Choo